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Evaluation and Regulatory Impact Analysis – Comments from a Swiss Legal Perspective

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Abstract: Many countries assess the effects of legislation by way of evaluation or regulatory impact assessment (RIA). The following article will discuss the functions of these methods and refer to the competent bodies' responsibility for legislative evaluation from a Swiss legal perspective. It will be argued that a mechanical or "one-size-fits-all" approach does not best serve the goals behind these practices but that a tailored and proportional application is warranted. Hence, it will also tentatively outline best practices for evaluation.

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Evaluation and Regulatory Impact Analysis – Comments from a Swiss Legal Perspective*

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Many countries assess the effects of legislation by way of evaluation or regulatory impact assessment (RIA). The following article will discuss the functions of these methods and refer to the competent bodies' responsibility for legislative evaluation from a Swiss legal perspective. It will be argued that a mechanical or "one-size-fits-all" approach does not best serve the goals behind these practices but that a tailored and proportional application is warranted. Hence, it will also tentatively outline best practices for evaluation.

1. Legal Sources

1.1. National Law

1.1.1. Article 170 of the Swiss Constitution

Switzerland is one of the few countries that introduce legislative evaluation on the constitutional level. It does so in Article 170 of the Swiss Constitution, which reads: "The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness."¹⁾

The constitution does not offer any legal definition for evaluation. Ideally, the legislator specifies the term. Thus, definitions and specifications of the term are embedded in the respective laws that include evaluation clauses.

The term "evaluation", the responsibility of Parliament to evaluate, and the legal consequences of a constitutional provision will be discussed in detail. It can already be pointed out that the term evaluation is rather broadly understood,²⁾ that it is not only the Swiss Parliament that evaluates legislation and that the anchorage of evaluations in the Constitution is not to be overestimated.³⁾

1) Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Swiss Constitution] Apr. 18, 1999, SR 101 (Switz.).

2) See *infra* section 2.

1.1.2. Federal Act on the Federal Assembly

An important concretization of article 170 of the Swiss Constitution constitutes Art. 141 of the Federal Act on the Federal Assembly of December 13, 2002.⁴⁾ It obliges government to document its bills to Parliament with a report containing information on "the planned implementation of the enactment, the planned evaluation of its implementation and the assessment of the planned implementation that took place in the preliminary stages of the legislative process" (lit. d). Government must also provide information on "the consequences for the economy, society, the environment and future generations" (lit. g). It is understood that these requirements leave substantial discretion to government with respect to how much detail the Parliament is provided with.⁵⁾ Still, there is no doubt that important questions must be sufficiently analyzed and documented.

Furthermore, on the basis of article 170 of the Swiss Constitution, the Federal Assembly has a mandate to take further action.⁶⁾ Article 27 of the Federal Act on the Federal Assembly entitles the organs of the Federal Assembly designated by law to "ensure that measures taken by the Confederation are evaluated as to their effectiveness." The law stipulates three ways to attain this aim. Firstly, the appointed bodies may "request the Federal Council to have impact assessments carried out" (lit. a), secondly "examine the impact assessments carried out on the instructions of the Federal Council" (lit. b) or lastly "instruct impact assessments to be carried

3) See *infra* section 4.

4) Bundesgesetz über die Bundesversammlung [Parlamentsgesetz, ParlG] [Federal Act on the Federal Assembly] Dec. 13, 2002, SR 171.10 (Switz.).

5) Although, there are principles and requirements concerning documentation, see Leitfaden für Botschaften des Bundesrates [Guideline for Documentation of the Federal Council], pp. 20 et seq., <https://www.bk.admin.ch/dokumentation/sprachen/04915/06864/>, see also Richtlinien des Bundes für die Darstellung der volkswirtschaftlichen Auswirkungen von Vorlagen des Bundes [Directives of the Federal Council for the Presentation of The Economic Impact of Federal Laws], https://www.seco.admin.ch/dam/seco/de/dokumente/Wirtschaft/Wirtschaftspolitik/RFA/Hilfsmittel/Richtlinien%20des%20Bundesrates.pdf.download.pdf/directives_d.pdf (last visited Sept. 12, 2016).

6) Giovanni Biaggini, BV Kommentar [Commentary on the Swiss Constitution], Art. 170 para. 3 (2007).

out themselves" (lit. c). These tasks are mainly carried out by Committees⁷⁾ whose duties are, inter alia, set out in Art. 44 para. 1 of the Federal Act on the Federal Assembly. Committees are "responsible for impact assessments in their areas of responsibility (lit. e) and they also "take account of the result of impact assessment" carried out by the government (lit. f).

1.1.3. Evaluation Clauses in Federal Acts

So far, Parliament has quite often provided for specific clauses (about 112 clauses in total) requiring evaluation in roughly 90 federal acts.⁸⁾ The respective clauses differ in terms of the questions to be evaluated, the responsible authority for the evaluation, the time frame (one-off or recurrent process), the addressees of the evaluation results and the consequences attached to a certain outcome. These clauses are important triggers for evaluation.⁹⁾

Still, Parliament and government are free to conduct evaluations also in the absence of such clauses. In-depth evaluations may be part of Parliamentary oversight, preparatory work for draft laws or effective implementation and review thereof.¹⁰⁾

1.2 OECD

The OECD is an important proponent of evaluations. In its 2012

7) See Art. 42 *et seq.* ParlG; see also <https://www.parlament.ch/en/organe/committees> (last visited Sept. 12, 2016).

8) See Übersicht über die Evaluationsklauseln des Bundes [List of Evaluation Clauses of the Swiss Federation], <https://www.bj.admin.ch/bj/de/home/staat/evaluation/materialien/uebersicht.html> (last visited Sept. 12, 2016).

9) See Thomas Widmer, *Der Beitrag der Evaluation zu einer guten Gesetzgebung*, vol. 1, LeGes Gesetzgebung & Evaluation, 15, para. 2.4 at pp. 17-18 (2015), see also Thomas Widmer, *Evaluation: Wober, Wobin und Wozu?* vol.1, SZK Zeitschrift für Kriminologie, 8, at p. 10 (2016), the increase of evaluation clauses also caused an increase of specialized units (mainly within the administration, see also *infra* section 4), which are responsible for implementation of evaluation obligations.

10) Georg Müller & Felix Uhlmann, *Elemente einer Rechtssetzungslehre*, para. 79 (3rd ed. 2013).

Recommendation on Regulatory Policy and Governance,¹¹⁾ the organization urges its members to "integrate Regulatory Impact Assessment (RIA)¹²⁾ into the early stages of the policy process for the formulation of new regulatory proposals."¹³⁾ Members should also "conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, are cost justified, cost effective and consistent, and deliver the intended policy objectives."¹⁴⁾

The OECD advises its member states and reviews their policies.¹⁵⁾ Switzerland adheres to these principles.¹⁶⁾

11) Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Regulatory Policy and Governance*, (Mar. 22, 2012) [hereinafter *OECD 2012 Recommendation*].

12) *See infra* section 2b).

13) *OECD 2012 Recommendation*, *supra* note 11, para. 4 at p. 4.

14) *Id.* para. 5 at p. 4. *See also* Stephan Naundorf & Claudio M. Radaelli, *Chapter 11: Regulatory Evaluation Ex ante and Ex Post: Best Practice, Guidance and Methods*, in *Legislation and Legisprudence in Europe, a Comprehensive Guide for Scholars and Practitioners* (Ulrich Karpen & Helen Xanthaki

2. Terminology and Methods

2.1. Evaluation

Evaluation is the term commonly used in Switzerland. It denominates a systematic and scientifically sound analysis of the effects of regulation.¹⁷⁾ The Swiss Society for Evaluation (SEVAL)¹⁸⁾ has published standards for its members,¹⁹⁾ drawing upon the "Program Evaluation Standards" of the "Joint Committee on Standards for Educational Evaluation".²⁰⁾

It should be noted that while the effectiveness of a regulation is articulated in article 170 of the Swiss Constitution as the most important object of evaluation, it is not the only one. Evaluation is understood in a broader sense²¹⁾, encompassing also the possible negative consequences of the law.²²⁾

17) See Müller & Uhlmann, *supra* note 10, para. 77 *et seq.*; see also Thomas Widmer *et al.*, *Evaluations-Standards der Schweizerischen Evaluationsgesellschaft*, Seval, pp. 1 *et seq.* (Dec. 5, 2000), www.seval.ch/de/documents/seval_Standards_2001_dt.pdf; see *e.g.* State Secretariat for Economic Affairs [SECO], Evaluation Programme, <http://www.seco-cooperation.admin.ch/theme/n/01033/01037/index.html?lang=en> (last visited Sept. 12, 2016).

18) See SEVAL, <http://www.seval.ch> (last visited Sept. 12, 2016).

19) Widmer *et al.*, *supra* note 17; see also Thomas Widmer, *Zehn Jahre Evaluationsstandards der Schweizerischen Evaluationsgesellschaft (SEVAL-Standards)*, vol. 2, SZK Zeitschrift für Kriminologie, 23, at pp. 25 *et seq.* (2011). SEVAL-Standards address evaluators, contracting authorities for evaluation, and other authorities, which may influence the process and therefore the outcome of evaluations. The standards are not considered to serve the purpose of a "Code of Conduct". They are rather a benchmark for quality regarding the evaluation process and evaluation results. See also extensively, Mauro Zamboni, *Chapter 6: Goals and Measures of Legislation: Evaluation*, in *Legislation and Legisprudence in Europe, a Comprehensive Guide for Scholars and Practitioners* (Ulrich Karpen & Helen Xanthaki eds., forthcoming 2017), pp. 1 *et seq.* of the chapter, where he brings up a new point highlighting the importance of addressing three preliminary aspects before planning an evaluation inquiry about a piece of legislation. In particular, the author draws the evaluators' attention to *a)* the structure of the legislative goals, namely where and when the legislative goals are intended to be realised and how the legislative goals can be traced, *b)* the functions of the legislative measures and how they relate to the relevant goals and *c)* the location of the legislative goals, i.e. which are the sources evaluators should resort to in order to discover them and how to examine this material using traditional or non-traditional instruments.

20) See Joint Committee on Standards for Educational Evaluation, <http://www.jcsee.org> (last visited Sept. 12, 2016).

21) See Biaggini, *supra* note 6, Art. 170 para. 2.

2.2. Regulatory Impact Analysis

Regulatory Impact Assessment (RIA) is the term used by the OECD and in many countries.²³⁾ In my view, it is difficult to draw a clear boundary between the two terms, "evaluation" and "RIA",²⁴⁾ and in this paper they are used interchangeably.

2.3. Standard Cost Model

The Standard Cost Model (SCM) is designed to measure administrative consequences for private enterprises.²⁵⁾ As it focuses on administrative costs only,

22) See e.g. Bundesgesetz über das Öffentlichkeitsprinzip der Verwaltung [Öffentlichkeitsgesetz BGÖ] [Federal Act on Freedom of Information in the Administration] Dec. 17, 2004, SR 152.3, Art. 19 (Switz.), the provision states that evaluation must include the costs incurred in the law's implementation and be reported to the Federal Council regularly.

23) See *OECD 2012 Recommendation*, *supra* note 11, para. 46 at pp. 4; 25 *et seq.* The OECD defines RAI as "a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. As employed in OECD countries it encompasses a range of methods. It is an important element of an evidence-based approach to policy making", see <http://www.oecd.org/gov/regulatory-policy/ria.htm>. See Jonathan Verschuuren & Rob van Gestel, Ex Ante Evaluation of Legislation: An Introduction, in *The Impact of Legislation, A Critical Analysis of Ex Ante Evaluation* (Jonathan Verschuuren ed., 2009) p. 6, where RAI is defined as a method of ex-ante evaluation. That is to say, ex-ante evaluation is seen as "a broader concept than RIA". See also Naundorf & Radaelli, *supra* note 14, pp. 2 *et seq.* of the chapter, for an analytical reference to RIA, where they mention that RIA should be primarily understood as "a process, fostering evidence-based learning and decision-making, that can be used for different aims and its principles and methods are easily transferrable to ex post evaluations too". See also, Andrea Renda, *The Development of RIA in the European Union: An Overview*, pp. 18 *et seq.* (Sept. 20, 2010), where RAI in the EU and in individual European Countries is analysed, <http://ssrn.com/abstract=1679764> (last visited Sept. 12, 2016).

24) See Müller & Uhlmann, *supra* note 10, para. 82; see also Carl Boehret & Goetz Konzendorf, *Guidelines on Regulatory Impact Assessment (RAI)*, prepared for the Federal Ministry of the Interior and for the Ministry of the Interior of Baden-Wuerttemberg, Speyerer Forschungsberichte 234, pp. 5 *et seq.* (Nov. 2004), in this study the term "RAI" comprises prospective, concurrent and retrospective RAIs. Therefore, a clear differentiation from evaluation may be difficult due to the different usage of the respective terms.

25) See Frank A.G. den Butter, Marc de Graaf & André Nijssen, *The Transaction Costs Perspective on Costs And Benefits of Government Regulation: Extending The Standard Cost Model*, Tinbergen Institute Discussion Paper No. 09-013/3, pp. 4 *et seq.* (Feb. 18, 2009), <http://ssrn.com/abstract=1345789>; see also Organisation for Economic Co-operation and Development [OECD], *International Standard Cost Manual*, pp. 6 *et seq.* <http://www.oecd.org/gov/regulatory-policy/34227698.pdf> (last visited Sept. 12, 2016).

it provides for reliable and comparable data. It does not assess possible benefits or negative effects of regulation other than costs.²⁶⁾

The SCM was first developed in the Netherlands but it is now widely used by various countries, e.g. by Germany.²⁷⁾ The SCM is not applied in Switzerland, yet, recent proposals all the more look closely at the effects of regulation on small and medium sized enterprises.²⁸⁾

3. Functions

3.1. Information and Transparency

The first function of evaluation constitutes information and transparency. Evaluation forces the legislator to present the goals of a law.²⁹⁾ This alone is valuable as complex legislation may often pursue conflicting goals and the evaluation may help to set priorities.³⁰⁾

26) See Müller & Uhlmann, *supra* note 10, para. 68.

27) See den Butter, de Graaf & Nijsen, *supra* note 25, pp. 5 *et seq.*; see also German Federal Statistical Office, *Programme for Bureaucracy Reduction and Better Legislation, Introduction of the Standard Cost Model, Methodology Manual of the Federal Government*, pp. 5 *et seq.* (Nov. 22, 2006) https://www.destatis.de/EN/FactsFigures/Indicators/BureaucracyCosts/Download/SCMManual.pdf?__blob=publicationFile (last visited Sept. 12, 2016). See also German Federal Government: Nationaler Normenkontrollrat (NKR), *Overview of NKR Tasks, Methodology*: https://www.normenkontrollrat.bund.de/Web/NKR/EN/Overview_of_Tasks/Methodology/_nodn.html;jsessionid=E87021525AE81BE45871CEB672A100D5.s2t2 (last visited Sept. 12, 2016). Furthermore, SCM is used among other countries e.g. by Scotland, Slovenia, Ireland, Czech Republic, Sweden, Denmark and the UK.

28) See Müller & Uhlmann, *supra* note 10, para. 69; see also Werner Bussmann, *Die prospektive Evaluation und ihre Verfahren zur Prüfung von Erlassen*, vol. 2, LeGes Gesetzgebung & Evaluation, 175, at p. 181 (2009).

29) Widmer, *supra* note 9, para. 2.4 at p. 18; see also OECD 2012 Recommendation, *supra* note 11, para. 6 at pp. 4, 13. See also Werner Schroeder, *Bessere Ergebnisse durch bessere Rechtsetzung*, vol. 3, Zeitschrift für Gesetzgebung, 193, at p. 200 (2016), evaluation provides furthermore an information basis to the legislator. Based on the findings the Commission of the European Union for example identifies "necessity and effectiveness" (Notwendigkeit und Wirksamkeit) of a legislative proposal at an early stage of the legislative process.

30) On a similar note about the function of evaluation, see Zamboni *supra* note 19, p. 1 of the chapter,

The legislator must not only present the goals of the law but should also take into account its possible side-effects i.e. the legislator may not think only of the benefits of the law but should also consider its disadvantages. By way of example, disadvantages may comprise costs for both private parties and the government, let alone restrictions to individuals' fundamental rights and to economic freedoms.³¹⁾ Finally, new regulation may as well create legal uncertainty and there are also cases in which the lawmaker should try to anticipate avoidance strategies of private parties. Private parties may circumvent new rules by stockpiling less ecological goods (e.g. light bulbs) or turning to foreign countries.

When the positive and negative effects of the law are properly analyzed, evaluation reveals the choices of the legislator. The intentions of the legislator become transparent.

3.2. Accountability

Related to the aforementioned aspect of transparency, evaluations may also enhance political accountability. If the effects of a law are known, the legislator must react accordingly, and if not, at least the legislator may not contend later that the effects of the law were unexpected or unknown. The knowledge that results from evaluations makes the legislator accountable for the laws passed, at least in a political sense.³²⁾

who argues that legislation is a tool whereby different actors implement certain ideas and visions within a community of people. Thus, it is important that it is evaluated in respect of the results the legislative process aspires to achieve and those that are actually achieved. That said, the essential component of evaluating the quality of legislation is its relational nature.

31) The Commission of the European Union has a "Better Regulation Agenda", in which the Commission defines its strategy towards better regulation. The Agenda sets new standards on transparency. One of the main objectives is to ensure that decision-making is open and transparent and that regulatory burdens on business, citizens or public administrations are kept to a minimum, *see* Better Regulation: Why and How, http://ec.europa.eu/info/strategy/better-regulation-why-and-how_en (last visited Sept. 12, 2016). *See also* European Commission, *Better Regulation for Better Results – an EU agenda*, pp. 5-6 (May 15, 2015), http://ec.europa.eu/info/files/better-regulation-better-results-eu-agenda-0_en (last visited Sept. 12, 2016).

However, I would like to point out also a possible risk that evaluations carry since one may argue that they may decrease accountability instead. Indeed, the legislator may be tempted to follow expert's advice blindly, and in case of unexpected negative effects, choose to "hide" behind scientific advice.³³⁾ In my view, it is always the legislator that is ultimately responsible for legislation, and critical analysis of the scientific findings is certainly warranted. An evaluation should not lead to a form of "expertocracy" but rather help the legislator to make sensible choices.³⁴⁾

3.3. Rationality

It is often said that evaluations enhance rationality. This is certainly true as long as evaluations help to make legislative choices transparent as discussed before. It is also true that knowledge supports rational decisions. That said, evaluations

32) The Commission of the European Union stated that the European elections in 2014 showed citizens' concern "with what they perceive as an undesirable level of EU involvement in their daily lives". Thereupon, the Commission pursues now various objectives set out in the "Better Regulation Agenda" (see *supra* note 31). The Commission recognizes its duty to ensure more efficient laws and respond to citizens' expectations by better regulation. Evaluation is a substantial part of this agenda and is seen as an instrument to achieve the agenda's objectives. See also European Commission, *Fact Sheet, Better Regulation Agenda: Questions & Answers*, p. 1 (May 19, 2015) http://europa.eu/rapid/press-release_MEMO-15-4989_en.htm (last visited Sept. 12, 2016).

33) See Müller & Uhlmann, *supra* note 10, para. 70. See also Naundorf & Radaelli, *supra* note 14, p. 22 of the chapter, who mention that consultation of experts in the framework of RIA should adhere to the principles of pluralism, discursive representation and transparency.

34) See Patricia Popelier & Victoria Verlinden, *The Context of the Rise of Ex Ante Evaluation*, in *The Impact of Legislation, A Critical Analysis of Ex Ante Evaluation* (Jonathan Verschuuren ed., 2009) pp. 19-20, the legislator "must always be open to corrections"; specialists cannot be held responsible for decisions. They "do not account for absolute truth or executable decisions". See also Christof Rissi & Fritz Sager, *Types of Knowledge Utilization of Regulatory Impact Assessments: Evidence from Swiss Policymaking*, vol. 7, *Regulation & Governance*, 348, at pp. 348-349 (2013), the OECD "expects RAIs to strengthen the position of factual arguments by experts over ideological arguments advanced by politicians". Experts may have an influence on the policymaking process as "political agents who try to enforce their discursive version of the truth upon the public sphere". Nevertheless, they cannot be "guardians of the truth" or sole decision makers. On the latter point see also Schroeder, *supra* note 29, p. 201, who argues that evaluation informs the legislator about possible consequences of their actions or laws. Evaluation constitutes an empirical element in the legislative process and improves the rational information finding and decision making but does not substitute political decision making.

sensitize Parliament and government to a diligent determination of goals and measures.³⁵⁾

However, in my view, it would be mistaken to overemphasize the contrast between "rational" choices based on evaluations on the one hand and "political" choices based on mere sentiment on the other. Evaluations do not absolve the legislator from hard choices. This is especially true when the legislator faces advantages and disadvantages that cannot be easily weighted against each other, such as costs against intangible benefits. Some countries try to monetarize all effects of the law to solve this problem.³⁶⁾ However, in my view, it is preferable that the legislator attaches values to certain benefits since absolute monetarization pretends a precision that does not exist.

It should also be noted that evaluation is not an exact science. Different methodological approaches may be all sound but do not necessarily produce the same results.³⁷⁾ This is especially true if future effects of the law are to be predicted. In this respect, it seems important that the legislator stays alert and poses critical questions when confronted with the results of an evaluation.

4. Responsibility

4.1. Parliament

In Switzerland, the evaluation clause in the Constitution attributes the

35) See Popelier & Verlinden, *supra* note 34, p. 18, a "rational decision making process" ideally "produces laws which endeavour to reach specifically defined aims in the most efficient way". It uses a system of information gathering and evaluation". Evaluation is therefore seen as a crucial instrument for rational and efficient legislative action.

36) See Müller & Uhlmann, *supra* note 10, para. 70; see extensively Robert W. Hahn & Paul C. Tellock, *Has Economic Analysis Improved Regulatory Decisions?*, vol. 22, *Journal of Economic Perspectives*, 67, at pp. 3 *et seq.* (2008).

37) See Müller & Uhlmann, *supra* note 10, para. 84 *et seq.*; see also e.g. Boehret & Konzendorf, *supra* note 24, pp. 7 *et seq.*

responsibility to initiate legislative evaluations to the Parliament. This seems sensible given that the Parliament is ultimately responsible for passing new legislation and assessing existing legislation. It is also the Parliament that may transpose the constitutional provision into specific laws. It has done so through the evaluation clauses discussed earlier.³⁸⁾ The Parliament may also evaluate a specific law or provision.³⁹⁾

In Switzerland, the Parliament is comparably poorly staffed.⁴⁰⁾ It will often mandate government or private experts to evaluate a specific law or provision. This is generally accepted but it may be considered less than ideal as government and private actors influence the design and possibly also the outcome of the evaluation. The Parliament has recently extended its evaluation services, which form part of the Parliamentary oversight.⁴¹⁾

4.2. Government

Irrespective of the Parliament's duty to evaluate legislation (according to the Swiss

38) See *supra* section 1a)iii.

39) Cf. Werner Bussmann, *The Emergence of Evaluation in Switzerland*, vol. 14, Evaluation, 499, at pp. 499 et seq. (Oct. 2008).

40) See Heidi Z'Graggen & Wolf Linder, *Professionalisierung der Parlamente im internationalen Vergleich, Studie im Auftrag der Parlamentsdienste der Schweizerischen Bundesversammlung* pp. 34, 48 et seq. (Aug. 2004), Switzerland's Parliament has limited resources compared to other OECD member countries. A study has shown that the Swiss Parliament is one of the least "professionalised" but one of the most cost-efficient Parliaments, https://www.parlament.ch/de/%C3%BCber-das-parlament/_layouts/15/DocIdRedir.aspx?ID=DOCID-1-8024 (last visited Sept. 12, 2016).

41) See Verordnung der Bundesversammlung zum Parlamentsgesetz und über die Parlamentsverwaltung [Parlamentsverwaltungsverordnung, ParlVV] [Parliamentary Administration Ordinance] Oct. 3, 2003, SR 171.115 Art. 10 (Switz.); the Parliamentary Control of the Administration (PCA) conducts evaluations – it is "the evaluation service of the Federal Assembly", see <https://www.parlament.ch/en/organe/committees/parliamentary-control-administration-pca> (last visited Sept. 12, 2016); see extensively Simone Ledermann, *Die Ausgestaltung der Unabhängigkeit von Evaluationsdiensten: Die Parlamentarische Verwaltungskontrolle im Kontext der Aufsichtsorgane des Bundes*, vol. 1, LeGes Gesetzgebung & Evaluation, 63, at pp. 69 et seq. (2016); see also Jahresbericht 2015 der Parlamentarischen Verwaltungskontrolle, BBl 6329, at p. 6336 (2016).

Constitution), the government can and should evaluate laws too. The government typically has the duty to execute laws, including the right to enact secondary legislation and the right to propose new laws.⁴²⁾ Proper execution of existing laws and sound proposals for new laws necessarily include a certain amount of evaluation. Indeed, the most common implementation of article 170 of the Swiss Constitution does not concern evaluation through Parliament but through government when proposing a new law.⁴³⁾

4.3. Administration

It may also be that an administrative agency conducts an evaluation. It may do so mandated by the government but also on its own initiative. This is often the case if the agency is tasked with the implementation of existing laws or with proposing new laws⁴⁴⁾. If an agency only occasionally conducts evaluations, it is certainly important that sufficient expertise is applied. This holds also true if a private expert is mandated. As there are often several ways to approach an evaluation, it is essential that the agency instructs properly the private expert.

4.4. Independent Agency

There is no doubt that the results of an evaluation may bring to the forefront critical political implications. Hence, it seems sensible that the bearer of possible bad news is somehow shielded from political retaliation. In my view, it is advisable that evaluations are conducted by an agency or a body that enjoys certain independence.⁴⁵⁾ This means that the agency should be independent not only from

⁴²⁾ Art. 182 BV.

⁴³⁾ See *supra* section 1a)ii.

⁴⁴⁾ See Müller & Uhlmann, *supra* note 10, para. 74-76; see also Prognos, *Expert Report on the Implementation of Ex-Post Evaluations, Good Practice and Experience in other Countries*, p. 32 (Dec. 6, 2013).

⁴⁵⁾ See e.g. The UK Regulatory Policy Committee [RPC] operates as an advisory non-departmental public

political parties but also from state organs, i.e. neither directly accountable to the government nor to the Parliament but serves both organs.⁴⁶⁾

Evaluations also require expertise and experience that can best be provided by a specialized unit.⁴⁷⁾ Evaluations also require a certain level of expertise and experience by the competent bodies. That said, the establishment of specialised units that will be entrusted with the examination of specific subject matters may ensure the efficacy of the evaluation process. Unfortunately, Switzerland has not put something like this in effect yet.⁴⁸⁾

5. Timing (ex ante-evaluation, ex post-evaluation, accompanying evaluation)

Evaluations may be conducted ex ante, ex post or accompanying a project.⁴⁹⁾

body, sponsored by the Department for Business, Energy and Industrial Strategy. The RPC provides the government with external, independent scrutiny of new regulatory and deregulatory proposals, *see* <https://www.gov.uk/government/organisations/regulatory-policy-committee/about> (last visited Sept. 12, 2016).

46) *See extensively* Ledermann, *supra* note 41, pp. 64-67.

47) The Commission of the European Union has a highly specialized and independent Regulatory Scrutiny Board, which reviews the quality of impact assessments and major evaluations of EU policies and laws, *see* http://ec.europa.eu/info/law-making-process/regulatory-scrutiny-board_en (last visited Sept. 12, 2016).

48) *See* Bussmann, *supra* note 39, p. 504, points out that so far evaluation development in Switzerland has involved various actors and therefore has been an interactive process between Parliament, public administration, the academic community and private associations as well as other federal offices.

49) *See* Bussmann, *supra* note 39, offers "seven points of entry" for evaluation in the "policy-formulation and policy-implementation process" in Switzerland. *See also* Schroeder, *supra* note 29, pp. 202-203, in the European Union the evaluation process ("Folgenabschätzungs-prozess") is initiated with an "Inception Impact Assessment". This tool allows the Commission of the European Union to set out a comprehensive specification of the proposed law and its possible effects at an early stage of the evaluation process. The Inception Impact Assessment includes a problem definition, regulatory objectives and possible political options and describes their potential effects. The main results of the Inception Impact Assessment are summarized in a report. The "Regulatory Scrutiny Board" reviews this report and forwards it to the competent department of the Commission. The Inception Impact Assessment and the Board's review results constitute an outline that is used for a legislative proposal and a final report on the Inception Impact Assessment. Therefore, this method of early detection of possible consequences of a law is an important information basis for the legislative proposal and the following political discourse on legislation.

The timing for the most beneficial evaluation of a legislative project may be debated, but I believe such an abstract discussion is to little avail. An ex ante-evaluation is helpful to avoid possible mistakes but often lacks relevant data.⁵⁰⁾ Ex post-evaluations may lead to more pertinent conclusions due to sufficient practical experience from the implementation of the new law but as it is applied retrospectively, the negative effects of the new legislation are unlikely to be prevented.⁵¹⁾ Hence, it hugely depends on the context whether ex ante, ex post, accompanying evaluation or all three are required.

One may certainly contend that the Parliament should not "forget" its laws. Ex ante-evaluation does not exempt either the Parliament or the government from monitoring the consequences of a law. Good legislation, including proper evaluation, is not a one-off task but a permanent duty. Hence, ex ante and ex-post evaluation should be understood rather complementary than mutually exclusive.

6. Practical Use – The-More-The-Better?

There is no doubt that evaluations may bring important insights into the process of lawmaking. Hence, it is understandable that many legal systems make evaluations mandatory either before or after enacting a new law. The OECD recommendations clearly require extensive regulatory impact analysis.⁵²⁾

50) See Verschuuren & van Gestel, *supra* note 23, p. 4, they define ex-ante evaluation as a "future oriented research into the expected effects and side-effects of potential new legislation, following a structured and formalized procedure and leading to a written report. Such research includes a study of the possible effects and side-effects of alternatives, including the alternative of not regulating at all." This definition underlines the problem of the abstract character of ex-ante evaluation but also highlights the importance of the method with regards to structured research as an approach that can form the basis for making legislative decisions.

51) Cf. *id.*, p. 4, it is argued that ex post evaluation is also "demand-driven, with few opportunities of cross-fertilization of evaluation results". That being said, ex post evaluation may in some cases not only be belated but finally not useful for further discussion on the respective legislation process. However, ex-post evaluation is an important tool to analyse the law's concrete effects; see also *OECD 2012 Recommendation*, *supra* note 11, pp. 26-27.

52) See *OECD 2012 Recommendation*, *supra* note 11, pp. 4-5.

In my view, there is one important caveat to be observed. Proper evaluation needs resources – even more critical in the legislative process is time.⁵³⁾ It seems unrealistic to assess every possible consequence of every provision of every law. The real challenge of evaluations is to properly choose the subjects for in-depth evaluation. I would contend that the legislator is much better served with a good selection of important issues rather than with superficial evaluations on every possible subject. It seems of high importance to prioritize.⁵⁴⁾ This requires proper planning of the legislative process and necessary observation of the laws passed by the Parliament.

7. Legal and Political Consequences

7.1. Legal Consequences

It is generally accepted that article 170 of the Swiss Constitution does not entail direct legal consequences that may stem from a legislative evaluation. In particular, a legal provision may not be challenged before the courts on the grounds that article 170 of the Swiss Constitution has been violated.⁵⁵⁾ In fact, the Swiss Supreme Court has been reluctant to invalidate state (cantonal) laws that are methodically flawed and has required little factual proof from legislator that a certain state measure is indeed effective. In practice, a measure "worth trying" with presumably little effect will typically survive judicial scrutiny.⁵⁶⁾

53) See Bussmann, *supra* note 28, p. 176.

54) Cf. Widmer, *Evaluation: Wober, Wobin und Wozu?*, *supra* note 9, p.11; see also Werner Bussmann, *Art. 170*, in *Die Schweizerische Bundesverfassung*, St. Galler Kommentar, para. 8 (Bernhard Ehrenzeller et. al. eds., 2014). See also Schroeder, *supra* note 29, p. 201, the number of evaluations conducted by the Commission of the European Union has increased and will continuously rise since the Commission strives for comprehensive evaluation of legislation.

55) See Bussmann, *supra* note 54, para. 10, 25.

56) Bundesgerichtsentscheid [BGE] [Federal Supreme Court Decision] 109 Ia 33, 39 (Switz.), "Die von der angefochtenen Norm erstrebte Preisparität mag möglicherweise keine starke Wirkung gegen den Alkoholismus entfalten, sie braucht aber nicht völlig wirkungslos zu sein" ("The price parity sought by the contested provision may not have a strong effect on alcoholism, but it doesn't need to be

Other courts are more demanding. The US Supreme Court has, in other areas, developed requirements that resemble a "due process of lawmaking".⁵⁷⁾ The German Bundesverfassungsgericht regularly requires legislator to present the Court with a factual substantiation of its assumptions. Such evidence can be delivered by evaluations. The Bundesverfassungsgericht strikes down laws that lack sufficient factual analysis.⁵⁸⁾

Technically, it is conceivable that a law attaches direct consequences to the fact that a certain measurable goal is not attained. Such provisions might be found in environmental protection laws.⁵⁹⁾ Still, in most instances, negative results require a revised decision from the legislator.

7.2. Political Consequences

Evaluations typically have political consequences. They help the legislator to make the best choices available. They also serve as a benchmark for determining whether the government has reached the goals stipulated in legislation. It is for this reason that evaluations may (and should) become highly political but shouldn't be politicized.⁶⁰⁾ It has been pointed out before that a preferable option would be to shield the evaluation body from political pressure.⁶¹⁾

wholly ineffective" [translated by the author]).

57) See extensively Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, pp. 199 *et seq.* (1976); see also e.g. *United States v. Lopez* 514 U.S. 549 (1995).

58) See e.g. *Entscheid des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court Decision] 50, 290*, at pp. 333 *et seq.* (Germany); see also *BVerfGE 57, 139*, at pp. 159 *et seq.* (Germany) with further references.

59) See e.g. *Bundesgesetz über die Reduktion der CO₂-Emissionen [CO₂-Gesetz] [Federal Act on the Reduction of CO₂-Emissions] Dec. 23, 2011, SR 641.71, Art. 29 (Switz.).*

60) Cf. Bussmann, *supra* note 39, p. 501, in a political system, which is shaped by various political actors, evaluation should ideally "serve as a resource for all partners" at all political levels. Evaluation may bring out the main points of a law and serve as a basis for discussion, where different interests are involved. Therefore, evaluation may also "improve the quality of argumentation within the legislative process".

61) See *supra* section 4d).

In order to play a proper role in politics, it seems essential that the results of evaluations are published. It is an imperative of transparency that results are made available by the government, ideally on its website.⁶²⁾ The results should also be included in the accompanying documents, if draft legislation undergoes a consultation process.⁶³⁾ In this respect, evaluations serve the goals of government oversight through the public and of a meaningful dialogue with the public.⁶⁴⁾

Switzerland has a tradition of publishing the results of evaluations,⁶⁵⁾ and a recent comparative study has indeed recommended this practice.⁶⁶⁾ I concur with the study's findings. There are only limited situations in which one might think of a sufficient interest of government not to publish the results of an evaluation. This might be the case of an ex ante-evaluation being conducted very early in the process and the publication may trigger a debate that is unwarranted at this stage. In such cases, governmental discretion might outweigh the public interest to access the results.

The duty to publish the results should not lead to a decrease of evaluations in

62) See e.g. UK Impact Assessment, <http://www.legislation.gov.uk/ukia> (last visited Sept. 12, 2016), where the UK government provides all relevant data on RAI online; see also List of Impact Assessment of the EU, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm (last visited Sept. 12, 2016), where the reports of the Regulatory Scrutiny Board (see *supra* note 47) are published after the EU Commission has adopted corresponding proposals.

63) See Bussmann, *supra* note 39, p. 500, within this context one should consider the specific characteristics of the Swiss political system and its participants. Extensive political rights and multiple levels of government allow broad political participation of different institutions and the public on legislation. Therefore, in Switzerland "public policies are more widely debated by the public than in most other countries." The publication of any evaluations may contribute to this political discussion.

64) The UK government provides a set of instruments for government departments and other interested target groups (publicly available). The guidance includes a "regulatory impact assessment template for government policies", a detailed guide and an "impact assessment calculator", which can all be downloaded on the government's homepage and individually edited, see Regulatory impact assessments: Guidance for Government Departments, <https://www.gov.uk/government/collections/impact-assessments-guidance-for-government-departments> (last visited on Sept. 12, 2016). Making RAI, its design and implementation transparent.

65) See ARAMIS Information System, <https://www.aramis.admin.ch/?Sprache=en-US>; see also Database for External Studies (including Evaluations), <https://www.admin.ch/gov/en/start/documentation/studies.html> (last visited Sept. 12, 2016).

66) See Prognos, *supra* note 44, pp. 32-34.

light of a possible fear of negative public reactions. This problem can be properly addressed by a culture of openness and dialogue, and indeed, in Switzerland there is little reluctance to publish the results of an evaluation.

8. Alternatives, namely Public Consultations

Evaluations are an important tool for better regulation. Still, one should not assume that they can cure all possible deficits. The legislator may for example ignore the results and, as stated, it is not practically feasible to evaluate every legal provision both *ex ante* and *ex post*. For this reason, one should also consider alternatives to evaluation and reflect on how to integrate evaluations into existing instruments and processes assuring legislative quality.

These questions are relevant to Switzerland. Evaluations do not have the same tradition as public consultations.⁶⁷⁾ In a nutshell, public consultations are conducted for every new or amended provision of federal or cantonal law. Public consultation commonly takes place before a draft law is subjected to the Parliament for deliberation and approval.⁶⁸⁾

As a form of participation of stakeholders in the legislative process, consultations serve other goals than those of evaluations. Typically, consultations will inform the government on political feasibility and on practical questions such as implementation.⁶⁹⁾ The feedback from stakeholders may be biased and does not satisfy any

67) See Art. 147 BV; see Bundesgesetz über das Vernehmlassungsverfahren [Vernehmlassungsgesetz VIG] [Federal Act on the Consultation Procedure] Mar. 18, 2005, SR 172.061, Art. 2 *et seq.* (Switz.), "the consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation" (Art. 2 para. 1 VIG).

68) See Organisation for Economic Co-operation and Development [OECD], *OECD Reviews of Regulatory Reform, Regulatory Reform in Switzerland, Government Capacity to Assure High Quality Regulation*, pp. 25-29 (2006).

69) See Felix Uhlmann & Christoph Konrath, *Chapter 5: Participation, in Legislation and Legisprudence in Europe, a Comprehensive Guide for Scholars and Practitioners* (Ulrich Karpen & Helen Xanthaki eds., forthcoming 2017), pp. 78 *et seq.*, stating that public consultation is not a "public opinion poll" but

methodological standards as evaluations do.⁷⁰⁾ Nonetheless, the insights from a consultation may concur with the results of an evaluation.⁷¹⁾ This is especially true if one turns to the feasibility and the costs of implementation. It is well-known that stakeholders may point out practical problems that the legislator was unaware of.⁷²⁾

Evaluations should be planned in respect to public consultation and vice versa. There is no general rule how to coordinate these two mechanisms. It may well be that the feedback from public consultation implies an in-depth evaluation of a specific question. It may also be sensible to include the evaluation in the documentation for public consultation as this has been pointed out before. Finally, it may also be necessary to run evaluations and consultations in parallel in order to save time in the process.

indicates political alliances and adversaries with regard to a specific piece of legislation. Finally, public consultation takes place at an early stage of the legislative process and indicates political feasibility and implementation issues at a time when adjustments can still be discussed. Thus, these results may prevent legislation from being useless and therefore "stillborn". See also Naundorf & Radaelli *supra* note 14, pp. 22-23, argue that consultation is "a fundamental component of regulatory evaluation and participatory governance and should be considered an ongoing instrument of quality management".

70) See Uhlmann & Konrath, *supra* note 69, pp. 80, 82, who take into account that participants of public consultations have individual interests and may be biased in that respect. Therefore, their input may not represent civil society. Results of public consultation are rather a "crafting tool for legislation" and a very useful information pool than a source of absolute "legislative truth".

71) See extensively Organisation for Economic Co-operation and Development [OECD], *Background Document on Public Consultation*, pp. 1 *et seq.* <https://www.oecd.org/mena/governance/36785341.pdf> (last visited Sept. 12, 2016).

72) See Art. 2 para. 2 VIg, the purpose of the consultation procedure is "to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project".

9. Conclusion

In sum, evaluations are an important tool to safeguard legislative quality. Still, it is important to use this tool proportionally – the more is not always the better. One should consider both ax ante- and ex post-evaluations, and one should also consider alternatives to evaluation. The state body conducting evaluations should have sufficient expertise and independence.

Abstract

Many countries assess the effects of legislation by way of evaluation or regulatory impact assessment (RIA). The following article will discuss the functions of these methods and refer to the competent bodies' responsibility for legislative evaluation from a Swiss legal perspective. It will be argued that a mechanical or "one-size-fits-all" approach does not best serve the goals behind these practices but that a tailored and proportional application is warranted. Hence, it will also tentatively outline best practices for evaluation.

Key Words

Evaluation, Regulatory Impact Assessment, Standard Cost Model, Switzerland, Swiss Constitution, Best practice for Evaluation, OECD, Public Consultation, Administrative Law

국문초록

입법평가와 규제영향분석
- 스위스 법제 관점에서의 논의 -

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대다수의 국가들은 입법평가 또는 규제영향분석의 방식으로 제정법의 효과를 평가한다. 본 논문은 스위스 법제의 관점에서 이 같은 입법평가방법론의 기능을 논의하고, 입법평가의 책임이 유권 기관들에 주목할 것이다. 이 글은 입법평가에 있어서 기계적이거나 모든 법에 두루 적용되는 평가 방법들은 제도의 목적에 부합하지 않음을 주장하고, 개별 법제에 따라 맞춤형이나 그에 부합하는 방식으로 평가 체계를 갖추어야 함을 강조한다. 이에 따라 본 논문에서는 입법평가의 최적화된 관행들을 잠정적으로나마 제시하고자 한다.

주제어

평가, 규제영향분석, 표준비용모델, 스위스, 스위스헌법, 최적 평가 관행, OECD, 공공의 협의, 행정법